WRITTEN TESTIMONY FROM MATTHEW SELIGMAN

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COMMITTEE ON THE JUDICIARY

Select Subcommittee on the Weaponization of the Federal Government

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Introduction

I thank the Committee for the opportunity to testify today. I am partner at Stris & Maher LLP and a fellow at the Constitutional Law Center at Stanford Law School. I have previously held academic appointments at Harvard Law School, the Yale Law School, and the Benjamin N. Cardozo School of Law. My scholarship focuses on constitutional law, with a particular emphasis on election law. I was counsel of record, with co-counsel from the Brennan Center for Justice, on an *amicus* brief on behalf of state and local election officials in *Murthy v. Missouri*.[1]

The focus of today's hearing is, once again, allegations of censorship by social media platforms, purportedly at the behest of the federal government. As I explained when I first testified in March of 2023, and as every member of the Committee undoubtedly knows at this point, the First Amendment applies to governmental restrictions of speech, not private conduct.[2] Since then, the Fifth Circuit partially affirmed the district court's decision in *Missouri v. Biden*.[3] The Supreme Court issued a stay of the injunction and granted certiorari to review the case on the merits, now captioned *Murthy v. Missouri*. It held oral arguments on March 18, 2024.[4]

My testimony today will explain why, based on the justices' statements at oral arguments, the Supreme Court is likely to rule in favor of the Biden administration officials and federal agencies that the district court improperly enjoined from engaging in routine communications with social media platforms. As I explained in my previous testimony, social media platforms' content moderation decisions have always rested and remain with the platforms themselves. Administration and agency officials may lawfully present information to platforms and seek to persuade the platforms of the government's point of view. That lawful government speech neither compels platforms to take any action on third parties' speech nor converts the platforms into state actors. As a result, the platforms' content moderation decisions about which the plaintiffs complain did not violate the First Amendment.

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[1] Brief of *Amicus Curiae* Election Officials in Support of Neither Party, *Murthy v. Missouri*, No. 23-411 (Dec. 26, 2023).

[2] The First Amendment "safeguard[s] the rights of free speech" by imposing "limitations on state action, not on action by" private parties. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). *See also Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 128-30 (2019) ("protect[ing] a robust sphere of individual liberty" so private parties can "exercise editorial discretion over the speech" appearing on their platforms requires "enforcing th[e] constitutional boundary between the governmental and the private").

[3] *Missouri v. Biden*, 3:22-cv-01213 (W.D. La.).

[4] The transcript is available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-411_o759.pdf.

The legal framework governing this case remains the same as it was last year. A First Amendment claim based on private conduct may proceed only if that conduct "can fairly be seen as state action."[5] The Supreme Court has explained that courts must "avoid[] the imposition of responsibility on [governmental officials] for" private "conduct it could not control."[6] Accordingly, officials "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that" of those officials.[7] "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding" governmental officials "responsible for those initiatives."[8] "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains."[9]

By granting certiorari in *Murthy v. Biden*, the Supreme Court has taken the opportunity to ensure that these legal principles are faithfully applied to the facts of this case. At oral argument, the justices identified at least five fatal flaws with the plaintiff-respondents' legal positions:

1. Factual Misrepresentations.

   Numerous justices from across the ideological spectrum excoriated the plaintiff-respondents' counsel for misrepresenting facts in their brief. Justice Sotomayor stated:

   > I have such a problem with your brief, counselor. You omit information that changes the context of some of your claims. You attribute things to people who it didn't happen to. At least in one of the defendants, it was her brother that something happened to, not her.[10]

   Similarly, Justice Barrett explained that the lower courts had committed clear error in misrepresenting administration officials' statements to platforms about President Biden's own Facebook account and a Twitter account impersonating the President's granddaughter as if those communications were about COVID misinformation or other matters of public policy:

   > If the lower courts, which I think they did, conflated some of those threats [about the President's own Facebook account or the Twitter account impersonating his granddaughter] with threats that were designed to be threats related to the pandemic and that kind of suppression, wouldn't that then be clear error?[11]

   The justices thus recognized a regrettable pattern in the litigation that recurs in this Committee's hearings: when the actual facts fail to amount to anything unlawful,

[5] *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).
[6] *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988). *See also Halleck*, 139 S. Ct. at 1928-30.
[7] *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).
[8] *Id.* at 1004-05.
[9] *Blum*, 457 U.S. at 1004.
[10] Oral Arg. Transcript at 84-85 (cleaned up).
[11] Oral Arg. Transcript at 59 (cleaned up).

those who complain about the social media platforms' content moderation decisions manufacture alternative facts to fit their political narrative.

2. Traceability.

Standing is a bedrock requirement of the federal courts' jurisdiction. "The principle of Article III standing is 'built on a single basic idea—the idea of separation of powers.'" *United States v. Texas*, 599 U.S. 670, 675 (2023) (citation omitted). "[A]n injury that results from a third party's voluntary and independent actions' does not establish traceability," an essential component of constitutional standing. *Changizi v. HHS*, 82 F.4th 492, 497 (6th Cir. 2023) (cleaned up). The plaintiff-respondents cannot show that their alleged injuries—that content they posted was moderated—are traceable to unlawful government conduct for two essential reasons. First, those content moderation decisions were made by the platforms, not any governmental official or agency. Second, the platforms began moderating content long before the Biden administration took office and have continued to do so long after the challenged communications between government officials and platforms ceased.

As Justice Kagan explained to the plaintiff-respondents' counsel:

> [I]f you're going to use standard ideas about traceability and redressability, I guess what I'm suggesting is I don't see a single item in your briefs that would satisfy our normal tests.[12]

3. Scope of Injunction.

Justices from across the ideological spectrum expressed concern about the scope of the injunction ordered by the district court, as modified by the Fifth Circuit. As Justice Sotomayor explained, the injunction applies to numerous government officials and agencies, some of whom the plaintiff-respondents do not even allege engaged in any unlawful conduct.[13]

Justice Gorsuch similarly noted his disapproval of the universal injunction, which purports to apply to people and entities that were not parties to the case:

> This is another example of a universal injunction, and the district court enjoined behavior by platforms that your clients didn't use and enjoined actions with respect to non-parties, not affecting your clients.
>
> . . .

[12] Oral Arg. Transcript at 104.
[13] Oral Arg. Transcript at 8-9.

> But your clients are your clients. They're the only ones complaining. And it's their case. It's their controversy. And, normally, our remedies are tailored to those who are actually complaining before us and not to those who aren't, right?[14]

Counsel for the plaintiff-respondents ultimately conceded that the Court should narrow the injunction to apply only to the seven plaintiffs in the case and the platforms that they actually used.[15]

4. Strict Scrutiny. Justice Jackson noted that even if the plaintiff-respondents were correct that social media platforms' content moderation decisions constituted state action—a point, to be clear, that neither she nor any other justice conceded—those moderation decisions still may not violate the First Amendment because they passed strict scrutiny. A governmental action satisfies strict scrutiny if the action is "the least restrictive means" of advancing a "compelling governmental interest."[16]

   Justice Jackson explained:

   > Our First Amendment jurisprudence requires heightened scrutiny of speech but not necessarily a total prohibition [on governmental restrictions] when you're talking about a compelling interest to ensure, for example, that the public has accurate information in the context of a once-in-a-lifetime pandemic.[17]

   Counsel for plaintiff-respondents conceded both that Justice Jackson's statement of the legal rule was accurate and that some direct governmental restrictions of speech related to content moderation would satisfy that standard:

   > Justice Jackson: Do you disagree that we would have to apply strict scrutiny and determine whether or not there is a compelling interest in how the government has tailored its regulation?
   >
   > Counsel: Certainly, Your Honor. I think, at the end of every First Amendment analysis, you'll have the strict scrutiny framework in which in some national security hypos, for example, the government may well be able to demonstrate a compelling interest, may well be able to demonstrate narrow tailoring.[18]

5. State Action.

   Most relevant to the issues before this Committee, justices from across the ideological spectrum indicated that they are poised to reject the plaintiff-respondents' expansive view of state action. In particular, the justices recognized that, as Justice Scalia explained, it is "the very business of government to favor and disfavor points of view

[14] Oral Arg. Transcript at 106-107 (cleaned up).
[15] Oral Arg. Transcript at 107.
[16] *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 1226 (1989).
[17] Oral Arg. Transcript at 30-31 (cleaned up).
[18] Oral Arg. Transcript at 69-70.

on . . . innumerable subjects."[19] Allegations that government officials communicated the government's point of view, including correcting factual inaccuracies and encouraging social media companies to ensure that their platforms are free from misinformation and other harmful content in accord with the platforms' pre-existing policies, does not convert those platforms into governmental actors.

Several justices explained that the type of conduct at issue in this case—government officials communicating with the social media platforms or the press to persuade them not to carry certain speech—is commonplace:

> Justice Kavanaugh: My experience is that the United States, in all its manifestations, has regular communications with has regular communications with the media to talk about things they don't like or don't want to see or are complaining about factual inaccuracies.[20]
>
> Justice Kagan: It seems like an extremely expansive argument. . . . You just wrote a bad editorial. Here are the five reasons you shouldn't write another one. You just wrote a story that's filled with factual errors. Here are the 10 reasons why you shouldn't do that again.
>
> I mean, this happens literally thousands of times a day in the federal government.[21]

Indeed, some justices indicated that conduct far beyond that alleged in the complaint here is routine:

> Justice Kavanaugh: Experienced government press people throughout the federal government regularly call up the media and berate them.[22]

Numerous justices explained that the issue in the case is whether the government coerced social media platforms into moderating content. Justice Sotomayor noted that counsel for the plaintiff-respondents consistently confused legal doctrines on this point:

> The reason we are talking about coercion is because private parties could have chosen on their own to censor that speech. They could have said we think it's obscene, I'm not going to be involved in this. The only issue became when that choice was overridden by the government. You're mixing situations and confusing legal doctrines.[23]

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[19] *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J. concurring).
[20] Oral Arg. Transcript at 53 (cleaned up).
[21] Oral Arg. Transcript at 71 (cleaned up).
[22] Oral Arg. Transcript at 27 (cleaned up).
[23] Oral Arg. Transcript at 68.

Justice Kavanaugh similarly explicated and endorsed the government's legal position:

> Justice Kavanaugh: Your key legal argument is that coercion does not encompass significant encouragement or entanglement and that it would be a mistake to so conclude because traditional, everyday communications would suddenly be deemed problematic?
>
> And by coercion, you mean threat of legal consequences? Adverse government action.
>
> It's probably not uncommon for government officials to protest an upcoming story on surveillance or detention policy and say, if you run that, it's going to harm the war effort and put Americans at risk.
>
> But if they tack onto that: And if you publish the story, we're going to pursue antitrust action against you?
>
> Deputy Solicitor General Fletcher: A huge problem.[24]

The justices further recognized that the plaintiff-respondents relied on a mistaken understanding of the Court's cases when they say that mere governmental speech or persuasion can amount to "such significant encouragement, either overt or covert, that the choice must in law be deemed that of the state."[25] The plaintiff-respondents interpret the term "encouragement" in the colloquial sense to include mere persuasion. That is legally incorrect. The "encouragement" to which the Court referred was not mere government speech like persuasion, but rather the government offering positive inducements or incentives for the platforms to moderate content. As Justice Gorsuch noted, no such threats or inducements are alleged in this case:

> Justice Gorsuch: You mentioned coercion repeatedly in terms of threats. Can there also be coercion in terms of inducements?
>
> Deputy Solicitor General Fletcher: We think there can. Often a threat or an inducement is the flip side of the other. You could construe it either way: a threat of prosecution, an offer of leniency. So we acknowledge that it could be both, but it has to be a threat or an inducement of some concrete government action, not just more government speech.
>
> Justice Gorsuch: And, hypothetically -- and I'm not saying this happened here -- but would a threat or an inducement with respect to antitrust actions qualify as coercion?
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> Deputy Solicitor General Fletcher: Sure.[26]

[24] Oral Arg. Transcript at 51-53 (cleaned up).
[25] *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).
[26] Oral Arg. Transcript at 31-32.

Finally, the justices recognized that none of the other doctrinal bases for attributing the social media platforms' content moderation decisions apply in this case. In particular, neither the Court's "entanglement" or "joint action" tests—in which the conduct of the private party and the government are so pervasively intertwined that they functionally and legally act together—are satisfied by the conduct alleged in the complaint. Justice Barrett made this point particularly clear:

> Justice Barrett: I agree with you Bantam Books is about coercion and drawing the line there. But, clearly, there are some times when things veer into the joint action space where we would say that maybe there was state action. And there's a dispute in this case about which framework is the right one.
>
> Deputy Solicitor General Fletcher: The main concern is going to be, have you crossed the line from just really trying to persuade to trying to threaten. . . . If you're talking about the government and the platforms acting together, turning over operational control, integrating their operations. That's a different case and might present hard state action issues, but it's just really not the kind of issue here.
>
> Justice Barrett: And not alleged here?
>
> Deputy Solicitor General Fletcher: Exactly right.[27]

The justices thus seem poised to reaffirm the constitutional principle that private platforms' content moderation decisions are not attributable to the government, and thus do not violate the First Amendment, unless the government coerces those decisions or is deeply entangled in the platforms' decision-making in ways not alleged here.

In conclusion, the core truth of this case remains the same. The plaintiffs allege a vast government conspiracy to censor their speech, but the facts simply do not support that accusation. Social media platforms adopted their content moderation policies independently, and they made every decision about how to apply those policies to particular content. Government officials offered their factual expertise and, on occasion, their views about whether certain content violated the platforms' own policies. The ultimate decision about what action, if any, to take regarding any content always remained with the social media platforms themselves.

I encourage the Committee to hold another hearing on this case once the Supreme Court issues its decision by the end of the Term in late June. I believe that Committee and the public would benefit from an open discussion of the important issues in this case in light of the Court's opinion. I would be glad to return to testify again at the Committee's request.

I thank the Committee for the opportunity to testify, and I look forward to answering your questions.

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[27] Oral Arg. Transcript at 57-58 (cleaned up).